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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

BIG "D" DEVELOPMENT CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRITZ LANHAM LYNE,
1400 Adolphus Tower,
Dallas, Texas
Counsel for Petitioner.

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	8
Conclusion	15
Certificate of Service	16
Appendix A — Statutes	A-1
Appendix B	
(1) Memorandum Findings of Fact and Opinion of United States Tax Court	B-1
(2) Decision of United States Tax Court	B-16
(3) Memorandum Sur Order of United States Tax Court	B-17
(4) Decision of United States Court of Appeals for the Fifth Circuit	B-21
(5) Judgment of United States Court of Appeals for the Fifth Circuit	B-22
(6) Order of United States Court of Appeals for the Fifth Circuit Overruling Petition for Rehearing	B-23

TABLE OF CASES AND LIST OF AUTHORITIES

CASES

	Page
Crosswell, Inc. v. Commissioner, 6 BTA 1315, (1927)	9
Frentz v. Commissioner, 44 TC 485 (1965)	9, 10
General Utilities & Operating Co. v. Helvering, 296 U.S. 200, 56 S. Ct. 185 (1935)	9
N.L.R.B. v. Amalgamated Clothing Workers of America, AFL-CIO, Local 990, 430 F 2d 966 (1970)	14

STATUTES

Internal Revenue Code of 1954 Section 453, 26 U.S.C.A. Sec. 453	4, 6, 14
Section 7482, 26 U.S.C.A. Sec. 7482	8

RULES

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	
Local Rule 18, 28 U.S.C.A. 1972 Pocket Part, p. 58	7, 11, 12, 15
Local Rule 21, 28 U.S.C.A. 1972 Pocket Part, p. 90	8, 11, 12, 14, 15

TEXTS

LAW OF FEDERAL INCOME TAXATION, Section 50.46, pp. 117-119	9

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 18, 1972.

CITATION TO OPINION BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court is unofficially reported at P-H Memo T. C., par. 71, 148 (1971) and is printed in Appendix B hereto, infra, p. B-1. The Judgment of the United States Court of Appeals for the Fifth Circuit, printed in Appendix B hereto, infra, p. B-22, was rendered without opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on the 18th day of January, 1972, Appendix B hereto, p. B-22, infra. Rehearing was denied on February 10, 1972, Appendix B hereto, p. B-23, infra. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1).

QUESTIONS PRESENTED

1. Does the denial by a United States Court of Appeals of oral argument pursuant to assignment to a Summary Calendar and the rendering by such Court of a decision without opinion, in an appeal made as a matter of right, deny an appellant his right of appeal from a decision of the United States Tax Court and relegate such right as it may exist to nothing more than a petition for review subject to denial or granting thereof at the discretion of the Court of Appeals?

2. Does the denial by a United States Court of Appeals of oral argument pursuant to assignment to a

Summary Calendar, and the rendering of a decision by such Court without opinion, from an appeal made as a matter of right, where the United States Tax Court decided the case, submitted solely on stipulated facts, based on legal theories never plead, proved or stipulated, deny an appellant his right of appeal and due process under the law?

3. Is the rendering of a decision without opinion by a United States Court of Appeals upon an appeal made to such Court as a matter of right, deny an appellant his right of appeal and due process under the law, when the undisputed record discloses that the case was submitted to the United States Tax Court solely on stipulated facts which were patently misconstrued by the United States Tax Court leading to errors in findings of fact and law?

4. Does the denial by a United States Court of Appeals of oral argument pursuant to assignment to a Summary Calendar, and the rendering by such Court of its decision without opinion, in an appeal made as a matter of right, where the applicable statutory provisions, as applied to the particular fact situation, have never been judicially decided in any reported case, deny an appellant his right of appeal and due process under the law?

STATUTES INVOLVED

The Statutory Provisions involved are:

(1) Internal Revenue Code of 1954, as amended
   (a) 26 U.S.C. Section 453(a) and (b)

(b) 26 U.S.C. Section 7482

(2) United States Court of Appeals for the Fifth Circuit Rules

(a) 28 U.S.C. United States Court of Appeals for the Fifth Circuit Local Rule 18

(b) 28 U.S.C. United States Court of Appeals for the Fifth Circuit Local Rule 21

STATEMENT OF THE CASE

On October 23, 1964, the Petitioner sold a tract of land to an affiliated company, Great Southwest Life Insurance Company ("Great Southwest"), in consideration of the assumption of a first lien on the property, a five year debenture bond issued by Great Southwest, plus the payment of the closing costs to the title company handling the transaction. Petitioner for its tax year ended October 31, 1964, reported the sale as an installment sale under Section 453 of the Internal Revenue Code of 1954 ("I.R.C."). The parties stipulated in open court that this Great Southwest debenture bond was "non-negotiable, and is practically worthless and completely conditional."

With respect to the above sale, an examining agent of the Respondent, in a report dated June 24, 1966, which report was delivered to the Petitioner, stated:

> "In consideration of the sale the taxpayer received a Five Year Debenture Bond of Great Southwest Life Insurance Co., bearing interest at 5½%, and which provided a sinking fund to insure its payment. And the purchaser paid closing costs of $2,128.50. The debenture was a security instead

> of an evidence of indebtedness of the purchaser, and the amount received included the fair value of that security, which is considered at 100% of its face, since it bore interest at 5½% and a sinking fund was provided for its payment at maturity."

The Respondent next assessed a tax deficiency against the Petitioner in a Statutory Notice Statement of July 9, 1968. After asserting the exact amount of deficiency as that asserted by the examining agent, the Respondent stated in its Statutory Notice Statement:

> "It is further determined that this gain is not reportable using the installment method of reporting."

Prior to the hearing before the United States Tax Court the above statements were the only reasons given the Petitioner by the Respondent for the alleged tax deficiency.

The Petitioner thereafter duly and timely filed its Petition in this matter in the United States Tax Court to which the Respondent filed its Answer. Said Answer merely admitted or denied the allegations of the Petition, but contained no affirmative or special pleas.

The total evidence in the Tax Court consisted of the admissions made in the pleadings, written stipulations of facts and oral stipulations made at the hearing in the United States Tax Court. In his opening statement at the hearing before the Tax Court the Respondent proposed four alternate positions as to the deficiency. Position number one was that there was

no down payment as required by the Section 453 of the I.R.C. and that the sinking fund provision in the Great Southwest debenture bond was not in fact a provision for payments to the Petitioner. Position number two was that the payment of the closing costs for the purchase of the subject property was a de minimus down payment which should not be considered as one of the two payments required by Section 453 of the I.R.C. The Respondent's third alternative position was that the down payment in the year of sale did not satisfy the requirement that there be provision for two or more payments to qualify as an installment sale under Section 453. The Respondent's fourth position was that the conditional nature of the sinking fund provision in the debenture bond was equivalent to requiring no further payments to be made.

In the Respondent's Brief to the Tax Court he stated his position as follows:

> "It is respondent's position that the true economic substance of this transaction is that petitioner's transfer of the Block 4/975 land to Great Southwest was in payment on October 23, 1964 of $591,175.55 of Petitioner's obligations under its Big D Bond held by Great Southwest. It is further respondent's position that Great Southwest's obligation under its bond was an obligation in form only and had no economic substance which would justify treating the Great Southwest bond as an evidence of indebtedness for installment sales purposes.
>
> *While respondent asserted various alternative positions in his opening statement, respondent is*

relying exclusively on his position that petitioner must recognize the full gain in the year of sale because the land was transferred in part payment of a debt." (Emphasis supplied)

In his brief to the Tax Court not only did the Respondent narrow the reason for his position but in fact this was the first time that this position or theory was ever mentioned as being relied upon in the claim against the Petitioner. The Petitioner would also show that there was absolutely no evidence as to this final and exclusive "position" of the Respondent.

The Tax Court held for the Respondent under the theory that the subject land was transferred in return for an immediate cancellation of a substantial portion of the Petitioner's "indebtedness" to Great Southwest.

The Petitioner appealed the decision of the Tax Court to the United States Court of Appeals for the Fifth Circuit, and after the Appellant's and Appellee's briefs were duly and timely filed the parties were notified that under Local Rule 18 of the Fifth Circuit Court of Appeals the case had been transferred to the Summary Calendar for disposition. Local Rule 18 reads in part as follows:

"(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar. (b) A separate summary calendar will be maintained for those cases to be considered without oral argument . . ."

Shortly after receiving notice that the case was transferred to the Summary Calendar, the United States Court of Appeals for the Fifth Circuit rendered its decision without opinion as follows:

> "PER CURIAM: The ruling of the Tax Court from which the present appeal is taken is based on findings of fact which are not clearly erroneous and without error in law. The Court has determined that an opinion would have no precedential value. AFFIRMED. See Local Rule 21."

The basis for federal jurisdiction in the Tax Court was Section 7442 of the Internal Revenue Code of 1954, as amended. (26 U.S.C. § 7442) Section 7482 of the I.R.C. gives the Petitioner the right to appeal the Tax Court decision to the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The facts of this case were stipulated and are undisputed. Their use and the inferences drawn from them are disputed.

The initial examining report of Respondent's agent and the Respondent's notice of the tax deficiency contained bases for claims against the Petitioner which were all abandoned at the trial before the Tax Court. In his brief to the Tax Court the Respondent stated his final theory as follows:

> "While respondent asserted various alternative positions in his opening statement, respondent is relying exclusively on his position that petitioner must recognize the full gain in the year of sale because the land was transferred in part payment of a debt."

The rule has been stated by the United States Supreme Court to be that:

> "Always a taxpayer is entitled to know with fair certainty the basis of the claim against him." *General Utilities & Operating Co. v. Helvering*, 296 U.S. 200, 206, 56 S. Ct. 185, 187 (1935).

Merten's has summarized the rule as follows:

> "An issue is raised too late when raised orally at a hearing, since the taxpayer must have an opportunity to prepare for factual issues, or in a brief where the parties have theretofore proceeded on the theory that another question is the only one in dispute. Rudimentary principles of equity and justice forbid consideration of a theory advanced by the Commissioner for the first time in his brief." *Law Federal of Income Taxation*, Section 50.46, pp. 117-119.

The cases support this rule. In *Crosswell, Inc. v. Commissioner*, 6 BTA 1315, 1320 (1927) it was stated:

> "At the hearing and by brief, counsel for the petitioner suggested that if personal service classification is denied, then the actual value of its contract with the Coca Cola Bottling Co. as of the date of incorporation should be included in invested capital, but no motion to amend the petition so as to include this issue was made. The primary purpose of pleadings is the joinder of issues between the parties. Issues attempted to be raised by brief, or orally at the hearing will be disregarded".

In the more recent case of *Frentz v. Commissioner*, 44 TC 485, 490 (1965) it was held:

> "The alternative theory was first mentioned in petitioners' opening statement at the hearing. The

> petitions do not raise this issue and the petitioners have at no time amended their pleading to include it. The issue is not before the Court. The Court has held on numerous occasions that it will not consider issues which have not been pleaded."

It is apparent that the theory or basis ultimately relied upon "exclusively" by Respondent was an afterthought that was neither raised nor discussed prior to the trial of this case. As in the *Frentz* case, *supra*, it was first alluded to in Respondent's opening statement to the Tax Court.

Petitioner having supported by pleading, evidence and authority its right to report, the undisputed gain on the sale of the real estate involved, on the installment method, the Respondent should not have been allowed for the first time in the Tax Court to raise a brand new theory not covered by any pleadings or by notice of any kind to the Petitioner.

The opinion of the Tax Court begins by citing the Respondent's allegation that the Petitioner "transferred the land in return for immediate part cancellation of a substantial portion of its indebtedness to Great Southwest". Then, wholly ignoring the parties' stipulation that such indebtedness was in fact reduced on an installment basis by the series of bookkeeping entries dating from June 1, 1965, to June 12, 1968, the Tax Court manages to uphold the Respondent's position by drawing the conclusion that the Petitioner "was in a position to effect an immediate $591,175.55 reduc-

tion of its $700,000 indebtedness" in the year of sale, with no more evidence to support same than the pleadings admitting that the Petitioner owned voting control, or the power to elect the directors, of Great Southwest. Other misuses of the stipulated facts were made by the Tax Court.

Having had the above indicated experience in the Tax Court the Petitioner timely filed its Notice of Appeal in the United States Court of Appeals for the Fifth Circuit. The Petitioner filed its briefs pointing out what it considers to be the errors in the proceedings before the Tax Court. Petitioner was then informed that in accordance with Local Rule 18 of the Fifth Circuit Court of Appeals the case was transferred to the Summary Calendar without affording the Petitioner the opportunity for oral argument, and when the decision of the Court of Appeals was made it was rendered without opinion in accordance with its Local Rule 21.

Petitioner contends that the application of Local Rules 18 and 21 of the Court of Appeals for the Fifth Circuit to this case has relegated the Petitioner's right of appeal to a mere petition for review subject to the granting or denial thereof at the discretion of the Court of Appeals. The procedure set out in Local Rules 18 and 21 in effect amounts to nothing more than a discretionary petition for writ of certiorari. By assigning a case to the Summary Calendar

without the opportunity of oral argument and then rendering a decision without an opinion, the Court of Appeals has done nothing more than this Court would do in denying a petition for Writ of Certiorari to the United States Court of Appeal.

The Petitioner is not aware of the reasons deemed sufficient by the Court of Appeals for the Fifth Circuit for placing its case on the Summary Calendar, and then, more importantly, it does not know the reasons why the Court of Appeals decided the case in favor of the Respondent. Especially in light of the errors made in this case by the Tax Court, this summary procedure, admittedly expediting the judicial process, has in effect denied the Petitioner its right of appeal and due process under the law. The errors in the Tax Court in any event render this case inappropriate for Rule 18 and 21 summary disposition.

There is no warrant in the record for giving the Tax Court "findings of fact" any particular weight, since the case was submitted to that Court solely on *stipulated* facts. The Tax Court's "Memorandum Findings of Fact and Opinion" took the parties' carefully worded stipulations out of context, and paraphrased them into mixed questions of fact and law, which created combined errors of both.

The best example of this assertion is the Tax Court's mixed conclusion of law and fact that "Petitioner was in control of Great Southwest", and its "inference"

from this unfounded conclusion that Petitioner was therefore in a position to unilaterally offset independent obligations between the two corporations. Same is especially startling in the face of stipulated bond provisions expressly denying Petitioner any right to demand payment of the Great Southwest debenture bond indebtedness, or even to assert a claim against Great Southwest assets by reason thereof, except under contingent circumstances which admittedly never arose. The Court's sole justification and support for this crucial "finding" was the parties' stipulation that Petitioner held "voting control", or the mere power to elect the directors, of Great Southwest. Yet, the Tax Court used that stipulaion, in effect and result, to pierce the Great Southwest corporate veil and treat it as Petitioner's alter ego absent *any* of the exceptional circumstances previously judicially held necessary to such treatment.

If holding Petitioner to be "in control" of Great Southwest to the extent necessary to reach the Tax Court's result is not "clearly erroneous" (because totally without warrant in the stipulated record), then certainly an "error of law appears", because the mere power to elect directors of a publicly held and state-regulated insurance company does not make it the alter ego of the possessor of such power. Such a radical departure from established law especially in light of the misinterpretation of stipulated facts should not have been countenanced by the Court of Appeals through the

use of Local Rule 21. Certainly the parties and future litigants are entitled to an exposition of the "divisive" and "disturbing" issues contained in the case.

Petitioner fully appreciates the circumstances and rationale supporting the Rule 21 treatment of certain cases, as articulated by the Court of Appeals for the Fifth Circuit in *N.L.R.B. v. Amalgamated Clothing Workers of America, AFL-CIO, Local 990*, 430 F. 2d 966 (1970). However, Petitioner would like to add this post script to that learned discussion, by way of a rhetorical question, i.e. how many lawyers and judges have found it very easy to analyze and to readily agree or disagree with a stated position until faced with the task of supporting or rebutting same by a "discursive statement of . . . articulated reasons."? (430 F. 2d at 972).

Petitioner respectfully submits that this case is one where such a "discursive statement" by the Court of Appeals would have revealed and illuminated the Tax Court's departure from the stipulated facts and established legal principles. In addition, the Petitioner submits that Rule 21 was improperly applied to this case in that an opinion from the Court of Appeals would have had as important precedential value. The Petitioner is aware of no reported case which interprets Section 453(b) of the I.R.C. to the particular fact situation of this case or any reasonably similar fact situation.

Rules 18 and 21 of the Court of Appeals for the Fifth Circuit have been relatively recently added to the Rules of that Court. The questions raised in this Petition have important application not only to the Petitioner and Respondent but to all parties to whom Rules 18 and 21 will be applied in the future. The need for modernizing the judicial process is recognized by most if not all involved in the process; however, rules cannot be formulated and applied which deny litigants due process under the law for the sake of judicial expediency.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Fritz Lanham Lyne

CERTIFICATE OF SERVICE

I, FRITZ LANHAM LYNE, attorney for Petitioner, certify that on this the 23rd day of March, 1972, pursuant to Paragraph 2(a) of Rule 33, Supreme Court Rules, and in full compliance therewith, three copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed to each of the following: The Solicitor General, Department of Justice, Washington, D. C. 20530, and the Commissioner of the Internal Revenue Service, 1111 Constitution Avenue N.W., Washington, D. C. 20224, by depositing said copies in the United States mail, properly addressed, first class air mail postage prepaid, certified return receipt requested. All parties required to be served have been served.

Please enter my appearance as attorney of record for the Petitioner.

Fritz Lanham Lyne

APPENDIX A

Sec. 453(a) and (b), Internal Revenue Code of 1954 [26 U.S.C. Sec. 453(a) and (b)]

(a) Dealers in Personal Property.—

(1) In general.—Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(b) Sales of realty and casual sales of personalty.—

(1) General rule.—Income from—

(A) a sale or other disposition of real property, or

(B) a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year) for a price exceeding $1,000,

may (under regulations prescribed by the Secretary or his delegate) be returned on the basis and in the manner prescribed in subsection (a).

(2) Limitation.—Paragraph (1) shall apply—

(A) In the case of a sale or other disposition during a taxable year beginning after December 31, 1953 (whether or not such taxable year ends after the date of enactment of this title), only if in the taxable year of the sale or other disposition—

(i) there are no payments, or

(ii) the payments (exclusive of evidences of indebtedness of the purchaser) do not exceed 30 percent of the selling price.

(B) In the case of a sale or other disposition during a taxable year beginning before January 1, 1954, only if the income was (by reason of section 44(b) of the Internal Revenue Code of 1939) returnable on the basis and in the manner prescribed in section 44(a) of such code.

Sec. 7482, Internal Revenue Code of 1954 [26 U.S.C. Sec. 7482]

§ 7482. Courts of review

(a) Jurisdiction.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

(b) Venue.—

(1) In general.—Except as otherwise provided in paragraph (2), such decisions may be reviewed by the United States court of appeals for the circuit in which is located—

(A) in the case of a petitioner seeking redetermination of tax liability other than

a corporation, the legal residence of the petitioner,

(B) in the case of a corporation seeking redetermination of tax liability, the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in any judicial circuit, then the office to which was made the return of the tax in respect of which the liability arises.

If for any reason neither subparagraph (A) nor (B) applies, then such decisions may be reviewed by the Court of Appeals for the District of Columbia. For purposes of this paragraph, the legal residence, principal place of business, or principal office or agency referred to herein shall be determined as of the time the petition seeking redetermination of tax liability was filed with the Tax Court.

(2) By agreement.—Notwithstanding the provisions of paragraph (1), such decisions may be reviewed by any United States Court of Appeals which may be designated by the Secretary or his delegate and the taxpayer by stipulation in writing.

(c) Powers.—

(1) To affirm, modify, or reverse.—Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

(2) To make rules.—Rules for review of decisions of the Tax Court shall be those pre-

scribed by the Supreme Court under section 2072 of title 28 of the United States Code.

(3) To require additional security.—Nothing in section 7483 shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review.

(4) To impose damages.—The United States Court of Appeals and the Supreme Court shall have power to impose damages in any case where the decision of the Tax Court is affirmed and it appears that the notice of appeal was filed merely for delay.

United States Court of Appeals for the Fifth Circuit
[28 U.S.C. Federal Rules of Appellate Procedure]

Rule 18. Summary Calendar

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409.

United States Court of Appeals for the Fifth Circuit

[28 U.S.C. Federal Rules of Appellate Procedure]

Rule 21. Affirmance Without Opinion

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

See N. L. R. B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F. 2d 966.

APPENDIX B

T. C. Memo. 1971-148

UNITED STATES TAX COURT

BIG "D" DEVELOPMENT CORPORATION
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 4758-68 Filed June 21, 1971.

Fritz Lyne and *Ira Lee Allen*, for the petitioner.
Richard K. Seltzer, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

STERRETT, *Judge:* Respondent determined a deficiency of $143,701.35 in petitioner's income tax for the fiscal year ending October 31, 1964. The question before the Court is whether a sale of land by petitioner in 1964 qualifies for installment method of reporting income under section 453(b).[1]

FINDINGS OF FACT

All of the facts were stipulated. The stipulation and exhibits attached thereto are incorporated herein by this reference.

[1] All statutory references are to the Internal Revenue Code of 1954 unless otherwise indicated.

The Big "D" Corporation (hereinafter referred to as petitioner) is a Texas corporation presently having its principal place of business in Houston, Texas. At the time of filing its petition herein, petitioner's principal place of business was located in Dallas, Texas.

Petitioner was incorporated in 1955 and has kept its books and reported its income on a cash basis, utilizing a fiscal year ended October 31. Petitioner timely filed its Federal corporation income tax return for the 1964 fiscal year with the district director of internal revenue, Dallas, Texas.

During 1964, petitioner's president was D. A. Childre who, together with his brother H. Thad Childre, owned sufficient units of a voting trust so as to control the election of petitioner's directors. Also D. A. Childre owned 24.5 percent and H. Thad Childre owned 34.6 percent of petitioner's stock in 1964. Petitioner, in turn, controlled a voting trust and owned sufficient shares of common stock in Great Southwest Life Insurance Company (hereinafter referred to as Great Southwest), also a Texas corporation, to give it voting control of Great Southwest. During times relevant hereto, all, or almost all, of petitioner's directors and shareholders were directors of Great Southwest. H. Thad Childre was chairman of the board and D. A. Childre was president of Great Southwest during 1964.

Prior to 1964 petitioner had acquired land along the North Central Expressway near its intersection with

Blackburn and Haskell Streets in the city of Dallas. The property was referred to as the Block 4/975 land, and had an adjusted tax basis to petitioner of $414,631.02 on October 23, 1964. By general warranty deed dated October 23, 1964, and delivered at a closing on October 29, 1964, petitioner conveyed the Block 4/975 land to Great Southwest for a total price of $967,518 resulting in a net long term capital gain to petitioner of $552,886.98. The transaction was approved in a corporate resolution, dated October 29, 1964, passed by the board of directors of petitioner and in a corporate resolution, also dated October 29, 1964, passed by the board of directors of Great Southwest at their respective meetings held on that day. By those resolutions, each board of directors agreed that the total value of the Block 4/975 land was $967,518, based upon an appraisal, and that the effective date of the sale was October 23, 1964.

Great Southwest purchased the Block 4/975 land subject to a first lien note the principal amount of which on October 1, 1964, was $374,213.95 and upon which, as of October 23, 1964, there was accrued interest in the amount of $1,434.51. A check for $3,145.15 was issued by Great Southwest to Southwest Title and Abstract Company in payment of the full amount of the closing costs. In exchange for the Block 4/975 land, Great Southwest executed a bond payable to the petitioner and dated October 23, 1964. The bond (hereinafter referred to as the Great Southwest bond) was

in the face amount of $591,175.55 which was determined by subtracting from the agreed purchase price of $967,518 the closing costs paid by Great Southwest and chargeable to the petitioner in the amount of $2,128.50, and the first lien on the property in the amount of $374,213.95.

The terms of the Great Southwest bond provided it was payable on or before 5 years from its effective date, and that it would bear interest at the rate of 5½ percent per year. Amounts not exceeding a total of $150,000, out of specified percentages of premium income from various types of policies written by Great Southwest were to be placed in a sinking fund. Principal and interest were to be paid from the sinking fund. However no payments were to be made into the sinking fund if the capital and unrestricted surplus of Great Southwest would thereby be reduced below $687,900. Neither the unpaid principal nor the interest due under the bond would be a liability of Great Southwest or a claim against any of its assets except the sinking fund. Finally the bond retained for Great Southwest the right at its option, to make a payment of all or any part of the principal or interest at any time out of any funds of the company without penalty or loss rights under the bond. The Great Southwest bond was non-negotiable, completely conditional and practically worthless.

The total capital and surplus amount fixed under the Great Southwest bond was subject to adjustment in case of merger of Great Southwest. Effective December

31, 1964, Great Southwest and Texas Reserve Life Insurance Company merged and Great Southwest was the surviving corporation. In accord with the terms of the bond, the minimum total capital and surplus amount fixed under the bond before payments could be made into the sinking fund was adjusted upward from $687,900.00 to $1,497,699.33. At no time during the periods ended December 31, 1964, through December 31, 1968, was the combined capital and surplus of Great Southwest as much as $1,497,699.33.

At the conclusion of its fiscal year ending September 30, 1964, Great Southwest held a general obligation bond of the petitioner (hereinafter referred to as the Big "D" bond). The Big "D" bond was in the principal amount of $700,000 all of which was outstanding on September 30, 1964. The bond was due June 1, 1969, and it provided for interest at the rate of 5½ percent per year.

Payment of the Great Southwest bond was effected by entries on the books of petitioner reducing the principal and interest owing on the Big "D" bond held by Great Southwest as follows:

Date	*Total Payment*	*Interest*	*Principal*
June 1, 1965	$ 89,416.58	$ 8,908.12	$ 80,508.46
June 1, 1966	91,951.73	38,776.44	53,175.29
June 1, 1967	38,500.00	25,162.05	13,337.95
June 23, 1967	58,002.00	—	58,002.00
June 1, 1968	93,500.00	24,317.25	69,182.75
July 12, 1968	318,954.56	1,985.46	316,969.10
	$690,324.87	$99,149.32	$591,175.55

In its Federal corporate income tax return for fiscal year ending October 31, 1964, petitioner made a timely election to report the gain realized from the sale of the Block 4/975 property on the installment method. Respondent, in a statutory notice dated July 9, 1968, included the entire amount of the gain in petitioner's fiscal year 1964 income for the stated reason "* * * that this gain is not reportable using the installment method of reporting."

OPINION

We are to determine whether the transfer on October 23, 1964, by petitioner, Big "D" Development Corporation, of real estate in Dallas, Texas, known as the Block 4/975 property, to the Great Southwest Life Insurance Company qualifies under section 453[2] for reporting

[2] SEC. 453. INSTALLMENT METHOD.

(a) Dealers in Personal Property.—

(1) In general.—Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(b) Sales of Realty and Casual Sales of Personalty—

(1) General rule.—Income from.—

(A) a sale or other disposition of real property, or *** may (under regulations prescribed by the Secretary or his delegate) be returned on the basis and in the manner prescribed in subsection (a).

(2) Limitation—Paragraph (1) shall apply—

(A) In the case of a sale or other disposition during a taxable year beginning after December 31, 1953 *** only if in the taxable year of the sale or other disposition—

(i) there are no payments, or

(ii) the payments (exclusive of evidences of indebtedness of the purchaser) do not exceed 30 percent of the selling price.

under the installment method. Respondent contends that the entire gain realized on the transaction must be included in petitioner's income for its fiscal year ended October 31, 1964, because, it is alleged, petitioner transferred the land in return for immediate part cancellation of a substantial portion of its indebtedness to Great Southwest.

Prior to dealing with the issue thus framed, a preliminary matter must be disposed of. Petitioner in its reply brief contends that respondent in his opening statement before this Court and in his brief has raised a new issue which, not having been pleaded, cannot be entertained by this Court, or which, at least, shifts the burden of proof to the respondent. We cannot agree.

Respondent in the statutory notice said:

> (b) It is determined that you realized additional income of $550,903.47 from the sale of Block 4/975 of Middleton Brothers Oak Grove Addition to the City of Dallas, Dallas County, Texas, computed as follows:
>
> * * *
>
> It is further determined that this gain is not reportable using the installment method of reporting.

As can be seen the determination made by respondent is very broadly based. At the hearing where this case was submitted to the Court, respondent, in his opening statement, adduced several alternative

theories supporting the determination in the statutory notice. In his opening brief respondent discarded all theories but the one set out above; that the transaction resulted in the immediate cancellation of a substantial indebtedness owing to the vendee, and petitioner thus received all that was owing it under the agreement of sale.

It is readily apparent that respondent merely narrowed the issue after taking a broad position in the statutory notice. The specific reason for the purported deficiency, as finally asserted in respondent's opening brief and in his remarks before the Court, is consistent with and inherent in the determination set out in the notice of deficiency. Proceeding from the broad to the specific, as the respondent has in this case, does not destroy the presumptive correctness of the respondent's determination of deficiency and shift the burden of proof to the respondent, much less bar his contentions from consideration. Compare, *C. D. Spangler*, 32 T. C. 782, 793 (1959); and *Raoul H. Fleischmann*, 40 B.T.A. 672, 682 (1939) with *Rozelle McSpadden*, 50 T.C. 478, 493 (1968). It would be otherwise where respondent's determination in a statutory notice is narrowly drawn and, after the matter has been petitioned to this Court, respondent advances new grounds not directly or implicitly within the ambit of the determination made in the notice. *Arthur Sorin*, 29 T.C. 959, 969 (1958); *W. H. Weaver*, 25 T.C. 1067, 1085 (1956). Since respondent has not raised a new issue, we hold the respondent's

determination remains presumptively correct, and the burden of proof continues to be on petitioner.

We now turn to the substantive issue of whether gain on the transaction in question can be reported by the installment method. The installment method of reporting provided by section 453(b) is a relief measure and an exception to the general rule requiring a cash basis taxpayer to report an item of income in the year received. This being so, the provision must be strictly construed. *Cappel House Furnishing Co. v. United States*, 244 F. 2d 525, 529 (C.A. 6, 1957), affirming 140 F. Supp. 92 (S.D. Ohio, 1956). Substance and not form will determine whether a transaction is an installment sale, and an arrangement lacking reality will not be given effect. *Griffiths v. Commissioner*, 308 U.S. 355 (1939); *Hindes v. United States*, 326 F. 2d 150 (C.A. 5, 1964), reversing in part and affirming in part 214 F. Supp. 583 (W.D. Tex., 1963), on remand 246 F. Supp. 147 (W.D. Tex., 1965), reversed in part and affirmed in part 371 F. 2d 650 (C.A. 5, 1967), *Williams v. United States*, 219 F. 2d 523, 527 (C.A. 5, 1955); *Everett Pozzi*, 49 T.C. 119, 127 (1967).

On October 23, 1964, petitioner conveyed the Block 4/975 land to Great Southwest, and received in return the assumption of a first lien on the land in the amount of $374,213.95, payment of its $2,128.50 share of closing costs, and a bond in the face amount of $591,175.55. The total purchase price was $967,518. Petitioner had a basis of $414,631.02 in the property, and thus realized

a gain of $552,886.98. The Great Southwest bond was specifically payable to petitioner, bore interest of 5½ percent per annum, was non-negotiable, and was payable five years from its effective date of October 23, 1964. At the time of the conveyance, Great Southwest held a general obligation bond issued to it by the petitioner. The Big "D" bond was in the principal amount of $700,000, and nothing in the evidence indicates that any payments on the principal had been made prior to October 23, 1964. The due date for the Big "D" bond was June 1, 1969, and interest was payable on the bond at the rate of 5½ percent per year. The amounts due petitioner under the Great Southwest bond were satisfied by a series of entries on the books of petitioner from 1965 through 1968 whereby its obligation for principal and interest to Great Southwest under the Big "D" bond was reduced to zero. Petitioner had voting control of Great Southwest, and was in turn controlled by H. Thad Childre and D. A. Childre who were, respectively, chairman of the board and president of Great Southwest.

Under the circumstances here present petitioner must show that the Great Southwest bond was independent from the transaction conveying the Block 4/975 land. *United States v. Williams*, 395 F. 2d 508, 511 (C.A. 5, 1968); *Blue Flame Gas Co.*, 54 T.C. 584, 595 (1970). Careful scrutiny of the transaction and the obligations petitioner and Great Southwest owed each other is

required because of the close interrelationship of the two corporations.

Petitioner was in control of Great Southwest. Under the terms of the bond it gave in return for the Block 4/975 property, Great Southwest could pay the entire amount due at any time. Thus the inference can fairly be drawn that petitioner was in a position to effect an immediate $591,175.55 reduction of its $700,000 indebtedness to Great Southwest, and no evidence presently before this Court serves to negate this inference.

Petitioner in its reply brief argues there is no evidence showing that the Big "D" bond in the amount of $700,000, due June 1, 1969, and held by Great Southwest was precisely the indebtedness of petitioner to Great Southwest reduced by the book entries reflecting payment of the Great Southwest bond. In the stipulation of facts the parties jointly agreed that: "The following payments of principal and interest by Great Southwest Life Insurance Company to Big "D" Development Corporation were made by entries on the books of Big "D" Development Corporation reducing the principal and/or interest of the general obligation bond due June 1, 1969, of Big "D" held by Great Southwest Life Insurance Company. * * *" The evidence for the existence of the Big "D" bond was an abstract from a proxy statement, dated November 30, 1964, published in connection with the "Proposed Merger of Great Southwest Life Insurance Company, Dallas, Texas and Texas Reserve Life Insurance Company,

Houston, Texas." The abstract was a joint exhibit attached to the stipulation which the parties lodged with the Court. Petitioner has made no effort to show by evidence the existence of any other general obligation bond of Big "D" held by Great Southwest, due June 1, 1969.

The interrelatedness of the Big "D" bond with the sale of Block 4/975 is the heart of respondent's case. It is significant that petitioner, nonetheless, merely argues about the sufficiency of the evidence, and does not in fact deny that it was the Big "D" bond in the principal amount of $700,000, and due June 1, 1969, which was reduced by offsetting amounts owed under the Great Southwest bond. The play upon the evidence attempted by petitioner's counsel, who must surely have more than some knowledge of petitioner's affairs, is inappropriate.

The amount considered received in the year of a transaction by a taxpayer making an installment sale is computed by taking into account amounts constructively as well as actually received. *Williams v. United States, supra; Stephen A. Cisler, Jr.*, 39 T.C. 458, 466 (1962); *J. L. McInerney*, 29 B.T.A. 1, 6 (1933), affirmed 82 F. 2d 665 (C.A. 6, 1936). Any outstanding indebtedness of a seller to a purchaser cancelled in consideration for the transfer of property in an installment sale will be considered a payment received in the year of sale. *Riss v. Commissioner*, 368 F. 2d 965, 968 (C.A. 10, 1966),

affirming a Memorandum Opinion of this Court; *W. H. Batcheller*, 19 B.T.A. 1050, 1053-1054 (1930). The transfer of appreciated property in satisfaction of an indebtedness is a sale or exchange resulting in recognizable gain to the extent the cancelled debt exceeds the taxpayer's basis in the transferred property. *Harry L. Bialock*, 35 T.C. 649, 660 (1961); *Peninsula Properties Co., Ltd.*, 47 B.T.A. 84, 91 (1942). Thus we have concluded that petitioner, at the time of the sale, was in receipt of $591,175.55 since its indebtedness to Great Southwest could, at its sole discretion, be reduced by that amount.

The present situation appears analogous to cases where taxpayers have set up elaborate escrow schemes, *Williams v. United States, supra; Rhodes v. United States*, 243 F. Supp. 894 (W.D. S.C. 1965); *Everett Pozzi, supra*, or shell corporations; *Hindes v. United States, supra*, in an effort to establish a qualifying installment sale. In those cases the courts were able to see through the arrangements and observe that full receipt of the total consideration merely awaited the command of the seller, and that any cross indebtedness was lacking in reality. See also *Newmark v. Commissioner*, 311 F. 2d 913 (C.A. 2, 1962), affirming a Memorandum Opinion of this Court. There it was held that a taxpayer had received salary from his controlled corporation because demand notes issued in lieu of salary by the corporation could be offset against taxpayer's debt to the corporation. The interrelatedness of the Big

"D" bond, the Great Southwest bond, and the conveyance of the Block 4/975 property is further emphasized by the fact that both bonds bore interest at the rate of 5½ percent per year. *Blue Flame Gas Co., supra.*

The process of reducing the Great Southwest indebtedness by a series of entries on petitioner's books, decreasing its obligation to Great Southwest by equivalent amounts, will not serve to qualify the transaction in issue as an installment sale. The purpose for this method of payment is not clear from the record before us. We can only infer, as does respondent, that it was selected to accommodate petitioner's desire to qualify for installment reporting. However, mere bookkeeping formalisms engaged in solely for the purpose of permitting a taxpayer to report gain on the installment basis will not be given effect. *John H. Rickey*, 54 T.C. 680, 694 (1970).

Our decision here is not altered by the opinion in *Estate of Lipman v. United States*, 376 F. 2d 455 (C.A. 6, 1967), affirming 245 F. Supp. 393 (E.D. Tenn., 1965). There stock was purchased from the taxpayer-wife by a corporation which agreed, inter alia, to cancellation of the taxpayer-husband's indebtedness according to a set schedule in years subsequent to the year of sale. It was held that this provision did not constitute a payment in the year of sale. The Court of Appeals noted that the taxpayer-husband had covenanted not to compete with the corporation, and that while a vio-

lation of the covenant would cause the taxpayer-husband's indebtedness to become immediately due, the corporation would nonetheless be liable to continue payments to the taxpayer-wife for the stock. The present case clearly lacks this particular tripartite aspect. An additional reason the Court of Appeals affirmed the District Court in *Lipman* was because bankruptcy of the purchaser would leave the taxpayer-husband liable to the purchaser's creditors. We do not have in evidence the terms of the Big "D" bond and cannot say that bankruptcy of Great Southwest would leave petitioner liable to Great Southwest's creditors. Lacking evidence, we are not at liberty to assume facts favorable to the petitioner on whose shoulders the burden of proof rests.

The present case has presented a close factual question. The record in some respects is incomplete. The extent to which this Court is left uninformed as to the details of the transaction must weigh against the petitioner on whom the burden of proof rests. Based upon the whole record and for the reasons set forth above, we decide petitioner's gain on the sale of the Block 4/975 land in 1964 cannot be reported by the installment method but rather is fully taxable in its fiscal year ended October 31, 1964.

Accordingly:

Decision will be entered for the respondent.

UNITED STATES TAX COURT
WASHINGTON

BIG "D" DEVELOPMENT CORPORATION, *Petitioner*, COMMISSIONER OF INTERNAL REVENUE, *Respondent*.	Docket No. 4758-68

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed June 21, 1971, it is

ORDERED AND DECIDED: That there is a deficiency in income tax for the taxable year ended October 31, 1964, in the amount of $143,701.35.

(Signed) Samuel B. Sterrett

Judge

Entered: June 23, 1971

UNITED STATES TAX COURT
WASHINGTON

BIG "D" DEVELOPMENT CORPORATION, *Petitioner*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.	Docket No. 4758-68

MEMORANDUM SUR ORDER

Petitioner on July 15, 1971, filed a "Motion of Taxpayer to Vacate Decision and to Enter Order in Favor of Taxpayer" with an exhibit and affidavit attached. Petitioner in support of its motion alleges that the burden of proof should have rested on the respondent, and that all the relevant evidence concerning a certain $700,000 bond issued by petitioner to Great Southwest Life Insurance Company was not in the record. On August 5, 1971, respondent filed a memorandum in opposition to petitioner's motion.

A careful study of petitioner's motion and respondent's memorandum and a review of the record herein has presented us with no reason for changing the result in this case. The reasons the burden of proof was not shifted from petitioner to respondent were fully set forth in the opinion and will not be elaborated upon here.

Petitioner sold real estate to Great Southwest receiving in return a bond in the face amount of

$591,175.55. At the same time it is undisputed that Great Southwest held a bond issued by petitioner in the face amount of $700,000. The parties stipulated that the amount owed petitioner by Great Southwest was satisfied by reducing, through a series of book entries, a "general obligation bond due June 1, 1969", issued by petitioner and held by Great Southwest. Petitioner in its motion now contends that the $700,000 Big "D" bond held by Great Southwest was not paid off by the stipulated offsets. Attached to petitioner's motion is an affidavit by an individual who is secretary-treasurer of both petitioner and Great Southwest. The affidavit states that only the interest due on the $700,000 Big "D" bond was paid by offsets against the Great Southwest bond, and that the principal amount of the Big "D" bond is, in effect, still outstanding.

The only general obligation bond issued by Big "D", held by Great Southwest, due June 1, 1969, and in an amount sufficient to accommodate the stipulated offsets of which this Court, from the evidence before it, has knowledge, is the $700,000 Big "D" bond. Thus, it is reasonable to infer that the stipulated offsets refer to the $700,000 Big "D" bond. Petitioner, in its motion, correctly points out that a copy of its balance sheet in evidence reveals that during the period in issue it had outstanding general obligation bonds in the total amount of $1,750,000. There is no indication of the number of bonds which comprised that total and by whom they were held. In any event the Great South-

west balance sheet indicates the existence of only one Big "D" general obligation bond held by Great Southwest; that being the one in the amount of $700,000.

The affidavit attached to petitioner's motion does not constitute evidence before this Court because of its *ex parte* nature. Rule 31(f), Tax Court Rules of Practice. Even if credence is given to the statements in the affidavit and in petitioner's motion, the existence of some indebtedness, offset as stipulated, is not denied. Since petitioner had outstanding at the time of the transaction a total of $1,750,000 in general obligation bonds, it was obligated to establish not only that there was no offset of the amount due from Great Southwest as to the $700,000 Big "D" bond but also that there was no such offset as to the balance of the outstanding general obligation bonds.

Still assuming the truth of petitioner's allegations, there would remain unchallenged the inference that petitioner was in a position to cause an immediate reduction in the amount owed on a general obligation bond held by Great Southwest. It is this power by petitioner to cause immediate payment to itself that makes section 453(b) inapplicable to the controverted transaction. Whether such power was ever, in fact, exercised is, insofar as the applicability of the foregoing principle of Federal taxation is concerned, irrelevant. *Everett Pozzi*, 49 T.C. 119, 127 (1967).

In accordance with the foregoing petitioner's motion is hereby denied.

(Signed) Samuel B. Sterrett
Judge

Dated: Washington, D. C.
August 18, 1971

B-21

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2929
Summary Calendar*

BIG "D" DEVELOPMENT CORPORATION,
Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from a Decision of the Tax Court of the United States (Texas Case)

(January 18, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: The ruling of the Tax Court from which the present appeal is taken is based on findings of fact which are not clearly erroneous and without error in law. The Court has determined that an opinion would have no precedential value. AFFIRMED. *See Local Rule 21.*[1]

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*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y.*, 431 F.2d 409, Part I (5th Cir. 1970).

[1] See *NLRB v. Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970).

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2929
Summary Calendar

T. C. Docket No. 4758-68

BIG "D" DEVELOPMENT CORPORATION,
Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from a Decision of the Tax Court of the United States (Texas Case)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the said Tax Court in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner-appellant pay to respondent-appellee, the costs on appeal to be taxed by the Clerk of this Court.

January 18, 1972

Issued As Mandate:

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2929
Summary Calendar*

BIG "D" DEVELOPMENT CORPORATION,
Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from a Decision of the Tax Court of the United States (Texas Case)

(February 10, 1972)

ON PETITION FOR REHEARING

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.